

University of Groningen

Defining Hate Speech

Fino, Audrey

Published in:
Journal of International Criminal Justice

DOI:
[10.1093/jicj/mqaa023](https://doi.org/10.1093/jicj/mqaa023)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2020

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
Fino, A. (2020). Defining Hate Speech: A Seemingly Elusive Task. *Journal of International Criminal Justice*, 18(1), 31-57. <https://doi.org/10.1093/jicj/mqaa023>

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Defining Hate Speech

A Seemingly Elusive Task

Audrey Fino*

Abstract

This article looks at the international criminal law on hate speech that falls short of direct and public incitement to commit genocide. Using the most egregious form of hate speech that has been prosecuted as an international crime — that of direct and public incitement to genocide — as a baseline, the author analyses the legal parameters of hate speech as persecution (a crime against humanity) and hate speech as instigation (a mode of liability). In so doing, the author critically reviews the International Residual Mechanism for the International Criminal Tribunals' (IRMCT) appeal judgment in the *Šešelj* case (*Šešelj* Appeal Judgment) in the light of prior case law of the International Military Tribunal of Nuremberg (IMT) and the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY respectively). The author submits that a plain reading of the *Šešelj* Appeal Judgment supports the view that it is only the more extreme form of incitement to violence, incitement to commit crimes, followed by actual violent acts, that may constitute hate speech amounting to the crime of persecution: incitement to discrimination or incitement to hatred as such do not qualify. Whether 'incitement to violence' absent the commission of crimes could qualify as persecution (a crime against humanity) remains an unsettled point. With regard to hate speech as instigation, the *Šešelj* Appeal Judgment's restatement and application of the law causes less controversy: the substantial causal connection required for instigation was found to be direct in the circumstances of that case — even though directness is not a legal requirement for instigation. The author concludes that both these interpretations of hate speech are consistent with the earlier ad hoc tribunals' jurisprudence and, more generally, with international human rights law which, with some controversial exceptions,

* Audrey Fino is a consultant and lecturer in public international and international humanitarian law at the University of Groningen and a visiting lecturer at the University of Malta. She is also a PhD researcher on hate speech in international criminal and human rights law. She has worked as Legal Officer with REDRESS, at the International Criminal Tribunal for the former Yugoslavia, and at the UN Office of the High Commissioner for Human Rights. The views expressed are those of the author alone. [finaud8@gmail.com]

allows criminalization only of the most extreme forms of incitement to violence.

1. Introduction

With the rise in incidents of hate speech and hate crime around the world, exacerbated by the rise of nationalist political discourse against ‘others’, belonging to, for instance, a different colour, religion, nationality or ethnic origin or descent, there is a corresponding interest in what hate speech actually is.¹ Hate speech and hate crime are indicative of escalating internal strife in society and can possibly constitute an early warning sign of mass violations of human rights, crimes against humanity or even genocide.² Criminalizing hate speech is one tool in an array of measures that States can take to deter crime in all situations, including during armed conflict.

However, there is a paucity of jurisprudence on hate speech before international criminal tribunals. Most of the case law has focused on direct and public incitement to genocide, a crime first clearly spelled out in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), and replicated into the statutes of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC). The grey area, and thus admittedly more interesting legal issues, however, arise when hate speech is not so clear-cut, especially because it is neither direct nor public. More recently, the International Residual Mechanism for the International Criminal Tribunals (IRMCT), the successor of both the ICTR and ICTY, grabbing the media’s and scholars’ attention, rendered the *Šešelj* appeal judgment (*Šešelj* Appeal Judgment) on such hate speech.³

- 1 For the purposes of this article, the term ‘hate speech’ is used to refer to incitement to violence as incitement to commit crimes, falling short of direct and public incitement to commit genocide. It does not cover ‘mere’ incitement to hatred or discrimination. On the issue, see e.g. *Combating Racist Hate Speech* (CERD Recommendation No. 35), UN Doc. CERD/C/GC/35, 26 September 2013, at 46; *ECRI General Policy Recommendation No. 15 on Combating Hate Speech* (ECRI Recommendation No. 15), Council of Europe, European Commission against Racism and Intolerance, CR (2016)15, 8 December 2015, § 4. See also UN Secretary-General’s remarks at the launch of the United Nations Strategy and Plan of Action on Hate Speech, 18 June 2019, available online at <https://www.un.org/sg/en/content/sg/statement/2019-06-18/secretary-generals-remarks-the-launch-of-the-united-nations-strategy-and-plan-of-action-hate-speech-delivered> (visited 17 March 2020); Opening Statement by UN High Commissioner for Human Rights, 41st session of the Human Rights Council, 24 June 2019, available online at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24724&LangID=E> (visited 17 March 2020).
- 2 See *Framework of Analysis for Atrocity Crimes, A Tool for Prevention*, July 2014, at 18–24; *Decision on Follow-Up to the Declaration on Prevention of Genocide: Indicators of Patterns of Systematic and Massive Racial Discrimination*, CERD/C/67/1, 14 October 2005, §§ 8–9. See also *Report of the independent international fact-finding mission on Myanmar*, A/HRC/39/64, 12 September 2018, §§ 73, 81, 85.
- 3 Judgment, *Šešelj* (MICT-16-99-A), Appeals Chamber, 11 April 2018 (*Šešelj* Appeal Judgment).

This article attempts to address the question of what category of hate speech, short of direct and public incitement to genocide, is criminal. Neither the *Šešelj* Trial Judgment⁴ nor the *Šešelj* Appeal Judgment set out a clear definition of hate speech. The only positive definition of hate speech thus remains the one given by the *Nahimana et al.* Appeal Judgment, which distinguished between direct and public incitement to commit genocide on the one hand, and 'hate speech in general (or inciting discrimination or violence)' on the other.⁵ This failure by international tribunals to clearly address some of the basic questions that practitioners grapple with when prosecuting or defending hate speech cases, has given rise to various interpretations of what types of hate speech may be considered criminalized under international law. Some scholars argue that in certain circumstances, hate speech is criminal even if the words used do not call for violence.⁶ Others, on the other hand, acknowledging that hate speech falling short of calls to violence is not criminalized, opine that States should adopt a unified liability treaty on 'atrocities speech offences'.⁷ In their view, such a treaty would codify the new crimes of both 'incitement to commit war crimes' and 'incitement to crimes against humanity', which would include criminalizing hate speech which does not amount to calls for violence but is nonetheless part of a widespread or systematic attack against a civilian population.⁸

In this context of legal and judicial uncertainty, this article proposes to fill the gap and thus addresses the — seemingly basic — questions that have yet to be answered. First: is hate speech amounting to calls to hatred or discrimination, but short of calls to violence, criminal — or does it have to call to violence to constitute a crime? What is a 'call to violence'? Does it *include* calls to commit crimes or is a call to commit a crime *the same as* a call to violence? In other words, has the jurisprudence used the terms 'call to violence' interchangeably with 'call to commit crimes'? If a call to violence is a call to commit a crime, does the latter have to be a certain category of crime, such

4 Judgment, *Šešelj* (ICTY-03-67-T), Trial Chamber, 31 March 2016 (*Šešelj* Trial Judgment).

5 Judgment, *Nahimana, Barayagwiza, Ngeze* (ICTR-99-52-A), Appeals Chamber, 28 November 2007 (*Nahimana et al.* Appeal Judgment), § 692.

6 See e.g. W. Timmermann, 'International Speech Crimes Following the *Šešelj* Judgment', in P. Dojčinović (ed.), *Propaganda and International Criminal Law: From Cognition to Criminality* (Routledge, 2019), chap 4, at 115–116, 118; R. Wilson and M. Gillett, *The Hartford Guidelines on Speech Crimes in International Criminal Law* (Peace and Justice Initiative, 2018), at 144.

7 See G. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (Oxford University Press, 2017), at 19–24, 316–321, 346–347, 349–356; 373–382, 403–404; G. Gordon, *Reply by Gregory S. Gordon: On the General Part, the New Media and the Responsibility to Protect*, 14 July 2017, available online at <http://opiniojuris.org/2017/07/14/reply-by-gregory-s-gordon-on-the-general-part-the-new-media-and-the-responsibility-to-protect/> (visited 17 March 2020), at 1. See also W. Timmerman, 'Inciting Speech in the former Yugoslavia: The *Šešelj* Trial Chamber Judgment', 15 *Journal of International Criminal Justice* (2017) 133–155, at 154–155; Timmerman, *supra* note 6, at 119.

8 *Ibid.*

as crimes against the person?⁹ Secondly: does violence actually have to ensue for hate speech to be criminalized? Put differently, is there a causal nexus required between the hate speech and subsequent acts of violence, hatred, or discrimination? Can hate speech amount to an inchoate crime, whereby prosecutors would have no need to show causation between the hate speech and any subsequent acts of violence, hatred, or discrimination?

To assist in this inquiry, the article will first briefly review the crime of direct and public incitement to genocide, thus considering what hate speech is *not*. This will serve as a baseline against which to analyse hate speech. By identifying the legal test required for a conviction for the most egregious cases of direct and public incitement to genocide, the author will be able to effectively discuss the relatively less obvious cases of hate speech that are also prohibited under international criminal law. The article does so through a practical assessment of the International Military Tribunal of Nuremberg (IMT) and ICTR jurisprudence in the light of the more recent *Šešelj* Appeal Judgment, rather than from a theoretical perspective of whether hate speech is an inchoate crime or not.

The discussion will then turn to a critical analysis of the *Šešelj* Trial Judgment and the *Šešelj* Appeal Judgment. Without delving into the various controversies surrounding it, eloquently articulated by Judge Lattanzi in her partially dissenting opinion,¹⁰ the *Šešelj* Trial Judgment presents us with a unique opportunity to investigate what constitutes hate speech that is criminal, including: (i) whether calls to violent action are required; (ii) what this entails, e.g. calls to commit crimes; and (iii) the causal nexus required. This will be done by outlining the legal elements of the crimes and modes of liability for which *Šešelj* was convicted by the Appeals Chamber. The analysis of these issues is glaringly missing in the *Šešelj* Trial Judgment and, while the *Šešelj* Appeal Judgment sheds some light on certain aspects of this, the discussion is still by no means comprehensive — something inherent in an appeal procedure, which does not — and should not — entail a *de novo* review of the facts.¹¹

Since the *Šešelj* Appeal Judgment primarily focused on hate speech as the underlying act of persecution (a crime against humanity) and as a form of instigation (a mode of liability) the discussion will revolve around the legal test required for hate speech to qualify as persecution and as instigation of crimes, such as persecution, deportation and other inhumane acts (forcible transfer) as crimes against humanity, as well as murder, torture, cruel treatment and plunder of public or private property as violations of the laws or customs of war.¹² The case will be made that a contextual reading of the jurisprudence

9 The jurisprudence is silent on this point. A discussion on what constitutes ‘calls to violence’ is found below in the context of the discussion on incitement as the *actus reus* of persecution (a crime against humanity).

10 See Partially Dissenting Opinion of Judge Flavia Lattanzi – Amended Version, *Šešelj* Trial Judgment (Dissenting Opinion), Vol. 3.

11 See *Šešelj* Appeal Judgment, §§ 12, 14.

12 These were the crimes for which the prosecution requested the Appeals Chamber to convict *Šešelj*. See Third Amended Indictment, *Šešelj* (Indictment) (IT-03-67), 7 December 2007, §§ 18, 20–22, 24–30, 34. The author will not address the *chapeau* requirements of crimes against

shows that only hate speech that incites violence, in the form of inciting the commission of crimes, is criminal under international criminal law, while incitement to discrimination or to hatred do not qualify. Furthermore, in the context of hate speech as a crime of persecution, a crime against humanity, and as a mode of liability of instigation of crimes, a causal connection between such speech and the subsequent act of violence needs to be proven. The article concludes that the criminalization of hate speech should not be expanded nor broadly interpreted as this would go against both a holistic reading of the jurisprudence and international human rights law.¹³ A look at human rights law is instructive not only because the application and interpretation of international criminal law must be consistent with it, but also because it is also facing similar challenges in defining hate speech, as will be noted below.¹⁴

2. The Most Egregious Form of Speech — Direct and Public Incitement to Commit Genocide

As a starting point, we know what hate speech is not — it is not direct and public incitement to commit genocide.¹⁵ It is therefore useful to delve into what direct and public incitement to commit genocide is, so that we can exclude it — by a process of elimination — when trying to define the contours of hate speech.

As a statutory crime first set forth in the Genocide Convention, the elements of the crime of direct and public incitement to commit genocide are easier to ascertain, even in the light of the paucity of jurisprudence. This is because the text of the Genocide Convention itself, and an assessment of its *travaux préparatoires*, already explain the main purpose and object of the drafters. This is also why it is helpful to use this crime as a baseline to discuss the legal parameters of hate speech both as persecution (a crime against humanity) and instigation (a mode of liability).

Looking at the plain language of the Genocide Convention, it is the most extreme form of incitement that is criminalized — public and direct.¹⁶ The Genocide Convention also clearly excludes from its ambit hate speech ‘only’ inciting to racial discrimination or hatred, short of incitement to violence which is not genocide.¹⁷ For instance, showing support for other persons’

humanity but will limit the analysis to the underlying act of hate speech and when and how this may amount to persecution.

13 References are made to human rights law throughout but an in-depth analysis of hate speech under international human rights law is beyond the scope of this article.

14 See Art. 21(3) ICCSt.

15 *Nahimana et al.* Appeal Judgment, § 692.

16 Art. III(c) Genocide Convention.

17 See also D.F. Orentlicher, ‘Criminalizing Hate Speech in the Crucible of Trial: *Prosecutor v. Nahimana*’, 21 *American University International Law Review* (2006) 557–596, at 561, 563; W. Schabas, ‘Hate Speech in Rwanda: The Road to Genocide’, 46 *McGill Law Journal* (2000) 141–171.

speeches which incited genocide is not enough to constitute direct and public incitement to genocide.¹⁸

ICTR jurisprudence on the elements of this crime is also pertinent in understanding its contours: the *actus reus* of direct and public incitement to commit genocide requires that the accused directly and publicly incites the commission of genocide;¹⁹ the *mens rea* required is the intent to directly prompt or provoke (an)other individual(s) to commit genocide.²⁰

With regard to what can constitute the direct element of incitement, the *Nahimana et al.* Appeal Judgment, upholding the trial chamber's position,²¹ stressed that what is relevant is the meaning of the words used in the specific context.²² If the discourse remains ambiguous, even when considered in its context, it cannot constitute direct incitement to commit genocide.²³ The ICTR Appeals Chamber also required specifically urging another individual to take *immediate criminal action*, rather than merely making a vague or indirect suggestion.²⁴ Being an inchoate offence, the crime of direct and public incitement to commit genocide is punishable even where the incitement fails to produce the result expected by the perpetrator, that is, even if no genocide actually follows.²⁵ Against this backdrop, the author will now turn to the early jurisprudence on hate speech which does not amount to direct and public incitement to commit genocide.

18 Judgment, *Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, Ndayambaje* (ICTR-98-42-A), Appeals Chamber, 14 December 2015 (*Nyiramasuhuko et al.* Appeal Judgment), § 3340.

19 *Nahimana et al.* Appeal Judgment, § 677.

20 *Ibid.*; Judgment, *Ngirabatware* (MICT-12-29-A), Appeals Chamber, 18 December 2014 (*Ngirabatware* Appeal Judgment), § 58.

21 Judgment and Sentence, *Nahimana, Barayagwiza, Ngeze* (ICTR: 99-52-T), Trial Chamber I (*Nahimana et al.* Trial Judgment), 3 December 2003.

22 *Nahimana et al.* Appeal Judgment, §§ 701, 703, 711, 715.

23 *Ibid.*, §§ 701, 711.

24 *Nyiramasuhuko et al.* Appeal Judgment, § 3338.

25 *Nahimana et al.* Appeal Judgment, §§ 678, 720, 766. Some scholars argue that the jurisprudence of the ICTR is ambiguous on this point as many trial judgments also refer to the direct causal link between speeches and subsequent commission of crimes. This possibly reflects the position taken by the International Law Commission in its 1996 *Draft Code of Crimes Against the Peace and Security of Mankind*, in which it held that direct and public incitement attracts individual criminal liability when an act of incitement 'in fact occurs'. See R. Wilson, *Incitement on Trial* (Cambridge University Press, 2017), at 25, 32 (arguing that the *Nahimana et al.* Appeal Judgment did not completely clear up this causation issue), 42–43. See also *Report of the International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries*, UN Doc. A/C/CN.4/L.532, 17 July 1996, available online at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf (visited 17 March 2020), §§ 18, 22. The author is inclined to consider the Appeals Chamber's views as a mere factual assessment, i.e. that genocide followed the incitement in the Rwanda case, rather than a reflection of an actual legal standard.

3. The Early Jurisprudence on Hate Speech

Any inquiry into hate speech should commence with the IMT media cases against Julius Streicher, editor-in-chief of the anti-Semitic newspaper, *Der Stürmer*, and Hans Fritzsche, Head of the Radio Division Nazi's Germany's Ministry of Propaganda. In 1946, the IMT convicted Streicher of persecution based on his publications from 1938 through 1945,²⁶ while it acquitted Fritzsche because, though his speeches showed anti-Semitism, they did not urge persecution or extermination of Jews.²⁷

Some scholars argue that the two findings by the IMT support opposing views: on the one hand, that criminal prosecution can target a wide range of speeches amounting to persecution while, on the other hand, that such charges should only be directed at a narrow and extremely serious category of hate speech which amounts to direct calls to violence.²⁸ One line of interpretation goes even further and holds that Streicher was only convicted on the basis of unambiguous calls for extermination of Jews — a call to commit violent crimes — and not because of his earlier pre-World War II publications.²⁹

Forty years later, the ICTR was faced with the same issues when it was dealing with hate speech as persecution, a crime against humanity in, amongst others, the famous *Media* case against Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze (*Nahimana et al.*). Nahimana and Barayagwiza were found guilty of persecution on the basis of the fact that they had been, inter alia, advocating ethnic hatred or inciting violence against the Tutsi population for RTLM radio broadcasts in 1994; Ngeze was convicted in part for the same crime in relation to the content of *Kangura* newspaper publications, of which he was editor-in-chief.³⁰

The *Nahimana et al.* Appeal Judgment reversed those convictions for persecution based on hate speech *without a call to violence* against the Tutsis, while upholding those based on hate speech that was accompanied by direct calls to violence against Tutsis.³¹ It held that 'hate speeches *and* calls for violence',

26 See *Trial of the Major War Criminals before the International Military Tribunal*, Vol. 1 (IMT, Nuremberg, 1947), *Julius Streicher* (Streicher Finding), 302–304.

27 *Ibid.*, *Hans Fritzsche* (Fritzsche Finding), 336–338. See also *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. XIV (Nuremberg: October 1946–April 1949), *US v. Ernst Weizsacher et al.* (Ministries Case), Case 11, *Otto Dietrich* (Dietrich Finding), 565–576.

28 Orentlicher, *supra* note 17, at 582–585; Wilson and Gillett, *supra* note 6, at 122–123.

29 Orentlicher, *supra* note 17, at 585–586; M. Kearney, *The Prohibition of Propaganda for War in International Law* (Oxford University Press, 2007), at 40 and note 120.

30 *Nahimana et al.* Trial Judgment, §§ 7, 1081–1082, 1084.

31 See *Nahimana et al.* Appeal Judgment, §§ 988, 993, 995–997, 1001–1002, 1013–1014, 1016; *Nahimana et al.* Trial Judgment, §§ 1073, 1078–1079, 1081–1084. The *Ruggiu* Trial Judgment had also considered incitement amounting to advocacy of ethnic hatred short of violence as persecution. The judgment was however not appealed so it is unsure if an appeals chamber would have upheld these findings. See *Ruggiu* Trial Judgment, § 44(v)–(xii). Cf. Judgment, *Kordić and Čerkez* (IT-95-14/2-T), Trial Chamber, 26 February 2001, § 209 and note 272. ICTR and ICTY trial judgments are not binding upon each other. Judgment, *Karemera and*

considered as a whole and in the context of a widespread campaign of persecution against the Tutsis, constituted acts of persecution.³² Being crimes against humanity, such acts of persecution would have been committed as part of a widespread or systematic attack against the civilian population. Thus, the holding in the *Nahimana et al.* Trial Judgment that there need not be a ‘call to action in communications that constitutes persecution’ nor a ‘link between persecution and acts of violence’ was reversed on appeal.³³ Yet, the Appeal Chamber did not explicitly state which was the determinative factor for its finding of persecution: the hate speech, as part of a widespread and systematic attack against the Tutsi population, or the calls to violent acts, which in this case involved calls to commit crimes against the person, including murder, torture, ill-treatment and rape.³⁴

These early cases on hate speech do not therefore fully answer the question of whether hate speech short of calls to violence may be sufficient for a finding of persecution as a crime against humanity. From this case-law, it is also not clear if violence has to actually ensue and be caused by such calls to violence — though of course, factually, violence in the form of murder, deportation, torture, ill-treatment, and rapes did take place during and after Streicher’s and *Nahimana*’s respective writings or speeches.³⁵

Due to this lack of clarity, divergent viewpoints continue to plague the commentaries on the jurisprudence on hate speech. This is also why the Appeals Chamber’s judgment in the *Šešelj* case raised so many expectations, and why it likely disappointed so many when it was issued, since it still did not fully address the point of whether incitement to discrimination or hatred, short of calls to violence alone can amount to persecution, and if so, in which circumstances. To put the analysis in perspective, a short review of the case against *Šešelj* is in order.

4. The Case against Vojislav Šešelj — an Overview

Vojislav Šešelj, a nationalist politician, President of the Serbian Radical Party and member of the Serbian Parliament, was charged by the ICTY Office of the Prosecutor, inter alia, with having instigated and committed crimes against humanity and war crimes, including deportation and persecution, during the conflicts that ravaged the former Socialist Federal Republic of Yugoslavia during the 1990s.³⁶ The prosecution specifically charged Šešelj with persecution as a crime against humanity by direct and public denigration through hate

Ngirumpatse (ICTR-98-44A), Appeals Chamber, 29 September 2014, § 52; Judgment, *Lukić and Lukić* (IT-98-32/1-A), Appeals Chamber, 4 December 2012 § 260.

32 *Nahimana et al.* Appeal Judgment, § 988 (emphasis added).

33 *Nahimana et al.* Trial Judgment, § 1073.

34 See *Nahimana et al.* Appeal Judgment, §§ 987–988.

35 See *Streicher* Finding, 302–304; *Nahimana et al.* Appeal Judgment, § 988; *Ruggiu* Trial Judgment, § 44 (viii)–(ix), (xi).

36 Indictment, §§ 2–5, 10(b)(c)(d), 15–17, 31–33.

speech against the non-Serb population of Vukovar in Croatia, Zvornik in Bosnia and Herzegovina and Hrtkovci in Vojvodina, Serbia.³⁷ The prosecution further alleged that Šešelj recruited and organized Serb volunteer units, known as 'Šešeljevci', who committed crimes against non-Serb civilians.³⁸

The case against Šešelj was that he had instigated the direct perpetrators of the alleged crimes by, *inter alia*, using inflammatory and denigrating propaganda against non-Serbs in his speeches and publications.³⁹ It further held that Šešelj was aware of the power of his propaganda and his influence with Serb volunteers, in particular the Šešeljevci.⁴⁰ Šešelj, who represented himself, claimed that his speeches were intended to galvanize Serb troops and to articulate his own political vision.⁴¹ He acknowledged that he advocated his ideology, but claimed that this did not amount to persecution.⁴² The Trial Chamber in *Šešelj*, by majority, acquitted Šešelj of all charges even though it found that three of his speeches — one given in Hrtkovici (Vojvodina, Serbia) on 6 May 1992 and two to the Serbian Parliament on 1 and 7 April 1992 — were calls for the expulsion and forcible transfer of Croats.⁴³

On appeal, the prosecution averred that the Trial Chamber had erred in not finding Šešelj responsible for crimes on the basis of his speeches.⁴⁴ It submitted in this regard that the Trial Chamber had failed to engage with its core argument that his 'relentless propaganda campaign' instigated the commission of crimes against non-Serbs.⁴⁵ In the end, the Appeals Chamber reversed certain acquittals by the Trial Chamber, and entered convictions for *instigating* persecution (forcible displacement), deportation, and other inhumane acts (forcible transfer) as crimes against humanity and for *committing* persecution (violation of the right to security) as a crime against humanity in Hrtkovci, Vojvodina.⁴⁶ With this in mind, a brief overview of one of Šešelj's speeches, the Hrtkovici speech, which was the basis of his convictions on appeal, is called for. This is followed below by a discussion on various issues arising out of both the *Šešelj* Trial Judgment and *Šešelj* Appeal Judgment.

37 *Ibid.*, §§ 17(k), 20, 22, 33.

38 *Ibid.*, §§ 10(a), (g), 16, 20–22, 24, 26–27, 29, 32–33.

39 *Šešelj* Trial Judgment, §§ 286–287.

40 *Ibid.*, § 288.

41 *Ibid.*, §§ 9, 11, 289, 291, 329.

42 *Ibid.*, §§ 291, 297.

43 *Ibid.*, §§ 333, 338, 343 and pp. 109–110. The Trial Chamber further found that war crimes had been committed by Serb forces including the Šešeljevci but that there was no hierarchical link between Šešelj and his volunteers once they were integrated with Serb forces (*Ibid.*, §§ 116, 205–220, 249), and that there had been no JCE involving him (*Ibid.*, § 281. See also *ibid.*, §§ 220–280).

44 *Šešelj* Appeal Judgment, § 120.

45 *Ibid.*, § 123.

46 *Ibid.*, §§ 155, 165–166, 181.

5. Hate Speech as Persecution — the Hrtkovci Speech

On 6 May 1992, Šešelj spoke in the village of Hrtkovci in Vojvodina, Serbia and claimed ‘there was no room for Croats in Hrtkovci ... that the Croats who had not yet left of their own accord would be escorted to the border by bus; ... that he firmly believed that the Serbs from Hrtkovci and the surrounding villages ... would promptly get rid of the remaining Croats in [their] village and the surrounding villages.’⁴⁷ The crowd then chanted ‘*Ustashas out*’, ‘Croats, go to Croatia’ and ‘This is Serbia’.⁴⁸

The Trial Chamber found by majority that the speech given by Šešelj clearly constituted a call for the expulsion of Croats from the village.⁴⁹ However, it deemed, by a different majority, that the prosecution had failed to prove that this speech was the reason for the departure of the Croats or for the campaign of persecution carried out in the village following the speech.⁵⁰

The Appeals Chamber, recalling the Trial Chamber’s own finding that this speech constituted a ‘clear appeal’ for the expulsion of Croats in Hrtkovci, instead held that no reasonable trier of fact could have found that it did not ‘incite violence that denigrated and violated the right to security of members of the Croatian population’.⁵¹ According to the Appeals Chamber, Šešelj’s speech was grave enough to amount to persecution as a crime against humanity.⁵² With his speech, Šešelj ended the ‘relative peace in Hrtkovci’ and the ‘sense of safety by infecting the village with hatred and violence’ and led to the departure of Croats in the ensuing months.⁵³ It held that Šešelj’s speech denigrated Croats on the basis of their ethnicity, in violation of their right to respect for dignity as human beings.⁵⁴ The Appeals Chamber thus found Šešelj had committed persecution, a crime against humanity, based on a violation of the right to security.⁵⁵

A. Terminology Used

Looking first at the prosecution’s framing of the charge of persecution, the ‘direct and public denigration’ of non-Serbs echoes the terminology of the crime of direct and public incitement to genocide. This epitomizes the way

⁴⁷ *Ibid.*, § 331.

⁴⁸ *Ibid.*, § 332.

⁴⁹ *Ibid.*, § 333.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, §§ 161, 163.

⁵² *Ibid.*, § 163. The Appeals Chamber was satisfied that Šešelj’s speech amounted to discrimination in fact and that it was delivered with discriminatory intent, that his conduct formed part of the widespread or systematic attack against the civilian population encompassing also parts of Croatia and Bosnia and Herzegovina, and that he was aware that such conduct formed part of the attack. *Ibid.*, § 164.

⁵³ *Ibid.*, § 163.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, §§ 165–166.

the jurisprudence on incitement to genocide has shaped prosecutorial strategy and influenced the discourse on hate speech in judicial settings.

The Trial Chamber noted that there was no proof that the speech was the reason for the Croats' departure from Hrtkovci and the persecutory campaign against them, but did not explain why such proof would have been required.⁵⁶ It did not lay down the law on persecution and on hate speech as the *actus reus* of such crime, so we are left guessing why it reached its conclusions. Clarity on appeal was, therefore, even more necessary. The Appeals Chamber restated that persecution as a crime against humanity under Article 5(h) of the ICTY Statute was an act or omission which

discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and (ii) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion, or politics (*mens rea*).⁵⁷

Unlike the crime of direct and public incitement to genocide, the crime of denigrating hate speech as persecution requires that the persecution in fact takes place against the targeted person or group in violation of a fundamental right — that there be discrimination *in fact*. For this reason, it was important for the prosecution to prove the impact of the speech. For ease of discussion, the remainder of this section will follow the elements of persecution set forth above.

B. Actus reus of Persecution: Hate Speech as Incitement, including the Language of the Speaker, the Targeted Audience, and the Influence over such Audience

At the outset, it should be noted that the terminology and methodology used by the Appeals Chamber in the *Šešelj* case is at times less than ideal. The Appeals Chamber first recalled that the ICTR Appeals Chamber in *Nahimana et al.* had held that ‘speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security of the members of the targeted group and therefore constitutes “actual discrimination”’, and that the context is important.⁵⁸ It went on to establish that *Šešelj*, by ‘instigating the forcible expulsion of Croatians from Hrtkovci’, ‘incited violence against them, in violation of their right to security’, adding that he had also denigrated the Croatians of Hrtkovci on the basis of their ethnicity, in violation of their right to respect for dignity as human beings.⁵⁹ The Appeals Chamber here relied on its previous factual finding on instigation of forcible displacement and forcible transfer (amounting to persecution) to make a finding on commission of persecution,

⁵⁶ See *supra* text before note 50.

⁵⁷ *Šešelj* Appeal Judgment, § 159 (internal references omitted).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, § 163 and note 578 (referring to *Šešelj* Appeal Judgment, §§154–155).

considering the violations of fundamental human rights it entailed (right to security).⁶⁰ Put differently, in this case the factual findings made to find instigation were used as the ‘vehicle’ for the finding of commission of persecution.

Recalling the Trial Chamber’s own finding that Šešelj’s speech was a ‘clear appeal’ for the expulsion of Croats from Hrtkovci, the language used by Šešelj — ‘there is no room for Croats in Hrtkovci’,⁶¹ his direct address to the Croats, the targeted persons — ‘no, you have nowhere to return to’,⁶² his influence over the Serb crowd and the similarities between his words and the acts (‘repeated mistreatment, threats, and violence resulting in a large percentage of them leaving Hrtkovci’) that subsequently took place, the Appeals Chamber found that this speech amounted to incitement as the *actus reus* of persecution.⁶³ However, it did not explicitly define ‘incitement’. More specifically: is incitement a call to violent action or to crime?

The Appeals Chamber’s description of what it considers incitement, as *actus reus* of the crime of persecution, is rooted in contextual factors.⁶⁴ This has in turn led some scholars to argue that hate speech occurring in the context of a widespread or systematic attack against a civilian population can constitute persecution if it violates a fundamental right and if, considered ‘cumulatively’ with other persecutory acts, it meets the gravity threshold required for persecution.⁶⁵ This is so, in their opinion, even if the words in question do not call explicitly for violence.⁶⁶ In any case, they also point out that the Appeals Chamber emphasized the fact that Šešelj ‘incited violence (particularly in the form of expulsion of the Croatian population in Hrtkovci)’.⁶⁷ Other scholars however suggest that, in this case, there were actually no explicit calls to violence and ‘no need for an immediate context of violence and crimes’.⁶⁸

60 See *infra* discussion in 6. *Instigating Crimes through Hate Speech*.

61 Šešelj Appeal Judgment, § 161.

62 *Ibid.*, § 163.

63 *Ibid.*, §§ 162, 164. See also *ibid.*, § 154.

64 The Appeals Chamber had also not defined it in the *Nahimana et al.* Appeal Judgment. See *Nahimana et al.* Appeal Judgment, § 987.

65 See Wilson and Gillett, *supra* note 6, at 144. See also Judgment, *Bikindi* (ICTR-01-72-T), Trial Chamber III, 2 December 2008 (*Bikindi* Trial Judgment), § 394 (arguing that the same facts that could lead a trial chamber to find the existence of a widespread or systematic attack against a civilian population may also support a finding of other underlying acts of persecution as both have to meet the ‘discriminatory grounds’ threshold). Cf. *Nahimana et al.* Appeal Judgment, §§ 987–988; Art. 7(1)(h) ICCSt. Under the ICCSt., persecution as a crime against humanity must be directed against ‘any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender’ or ‘other grounds that are universally recognized as impermissible under international law.’ Unlike the *ad hoc* tribunals’ jurisprudence, however, this is generally understood to mean that persecution must occur in connection with another crime listed in Art. 7 of the ICC Statute. See Wilson and Gillett, *supra* note 6, at 119.

66 Wilson and Gillett, *supra* note 6, at 144.

67 *Ibid.*, at 138.

68 Timmermann, *supra* note 6, at 115–116.

A plain reading of the *Šešelj* Appeal Judgment confirms that the Appeals Chamber considered incitement to commit crimes, which could also reasonably be expected to involve or lead to violence, as an act of inciting violence.⁶⁹ It held that ‘no reasonable trier of fact could have found that Šešelj’s speech did not *incite violence*’ and repeated that he had in fact ‘*incited violence*’.⁷⁰ The Appeals Chamber clearly equates incitement to violence with incitement to commit crimes, and more specifically, forcible transfer and deportation. There is no indication in the *Šešelj* Appeal Judgment that the appellate judges considered the related issues of whether ‘incitement to violence’ could be broader than inciting crimes. This therefore remains an unsettled issue.

It should also be noted that, in addition, the Appeals Chamber did not address the possibility that Šešelj, by inciting forcible transfer and deportation on the basis of ethnicity, was inciting discrimination. Incitement to discrimination has been described as ‘beseeching listeners or readers to oppress the victim group in certain non-violent ways.’⁷¹ Thus, it remains unclear from this judgment and the prior jurisprudence, whether a case of incitement to violence, absent any incitement to commit a crime, or incitement to discrimination only (without other accompanying discriminatory acts) could amount to persecution under certain circumstances.

A sideways glance at human rights law is informative on this point. Incitement has been defined as statements about national, racial, or religious groups creating an imminent risk of discrimination, hostility or violence against persons belonging to them — where imminence is related to directness.⁷² With regard to racist hate speech, incitement has been defined as influencing others to engage in certain forms of conduct, including the commission of crimes, through advocacy or threats.⁷³ Advocacy is generally understood to be ‘explicit, intentional, public and active support and

69 *Šešelj* Appeal Judgment, § 163.

70 *Ibid.* (emphasis added).

71 Gordon, at 313. Discrimination has been described as ‘any distinction, exclusion or restriction made on the basis of race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, language, religion, political or other opinion, age, economic position, property, marital status, disability, or any other status that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field of public life.’ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (SR Report), UN Doc. A/67/357, 7 September 2012, § 44 (d). See also ECRI Recommendation No. 15, § 7 (h).

72 See SR Report, § 44 (c); ECRI Recommendation No. 15, § 7 (q). See also *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012* (Rabat Plan of Action), UN Doc. A/HRC/22/17 Add. 4, 11 January 2013, § 22 (likelihood, including imminence, implies that there should be some causation which is ‘rather direct’).

73 See CERD Recommendation No. 35, § 16; 16/18 *Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on*

promotion of hatred' towards a target group.⁷⁴ Meanwhile, violence is 'the use of physical force or power against another person, or against a group or community, which either results in, or has a high likelihood of resulting in, injury, death, psychological harm, maldevelopment or deprivation'.⁷⁵

While there are elements of convergence between some aspects of international human rights and international criminal law, such as the inclusion of incitement to commit crimes as an act of incitement and the concepts of 'imminence' and 'publicity', human rights law does not provide clear guidance as to whether incitement to discrimination, hostility, or violence should be criminalized or otherwise sanctioned.⁷⁶ The only emerging consensus among states seems to be, vis-à-vis the most extreme forms of incitement to violence, that of criminalizing incitement to imminent violence, and then only on the ground of religion or belief.⁷⁷ In light of this, the author is of the view that the only correct legal conclusion is that international criminal jurisprudence, similar to the consensus emerging in human rights law, may only be interpreted as criminalizing forms of incitement to violence, which are incitement to commit crimes where ensuing violence occurs. It does not criminalize incitement to 'simple' discrimination, hatred, or hostility when there is no incitement to actual violence.

In short, the Appeals Chamber in the *Šešelj* case chose to pursue, as the ICTY and ICTR had often done in the past, a factual, case-by-case assessment of whether the conduct in question constituted incitement, rather than laying down a general definition *in abstracto*. This may be judicially expedient, of course, but it does make identifying the legal standard of what constitutes incitement amounting to persecution somewhat harder, thus leaving more room to conflicting interpretations.

religion or belief (HRC 16/18 Resolution), Resolution adopted by the Human Rights Council, A/HRC/RES/16/18, 12 April 2011 § 5(e)–(f).

74 See SR Report, § 44(b). See also ECRI Recommendation No. 15, § 7 (a).

75 See SR Report, § 44(f). See also ECRI Recommendation No. 15, § 7 (ff).

76 See Reservations to UN treaties available online at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (visited 17 March 2020); https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en (visited 17 March 2020). There are no states objecting to the reservations made by the reserving states. See also CERD Recommendation No. 35, § 12 (referring to *General Comment No. 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, 12 September 2011, §§ 22–35, 33–35)–13. Cf. CERD had earlier taken a strict interpretation on the mental element required to support criminal liability for incitement. *Positive measures designed to eradicate all incitement to, or acts of, racial discrimination: implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4*, UN Doc. A/CONF.119/10, 1986, §§ 83, 96, 235.

77 See e.g. HRC 16/18 Resolution, §5(f) (adopted without a vote). See also Rabat Plan of Action, at 4–7 (Recommendations).

C. *Actus reus of Persecution: Causality or Impact of Speech and Discrimination in Fact*

The Appeals Chamber also noted that following Šešelj's speech, Croats were increasingly harassed, threatened and became victims of violence, which led to a large number of them leaving Hrtkovci.⁷⁸ The Appeals Chamber's reasoning is actually consistently peppered with references to violence against the Croats following Šešelj's speech. For instance, in both its discussions on commission of persecution and instigation, the climate of 'repeated mistreatment, threats and violence',⁷⁹ Šešelj's 'infecting the village with hatred and violence',⁸⁰ and 'the context of coercion, harassment, and intimidation, which was met with inaction by the local authorities'⁸¹ are regularly referred to. It seems that, equally important to the language used by Šešelj, are the resulting crimes and violent acts committed against the Croats.

The Appeals Chamber's discussion of incitement and the impact of such incitement (i.e. the threats and violence which indeed followed it) were intertwined to such an extent that the impact can be described as featuring as a decisive factor for the finding of persecution. Indeed, the impact of the incitement is usually relevant in the context of persecution to show that discrimination in fact occurred — it is a legal requirement, as mentioned above.⁸² Ideally, therefore, it should have been dealt with separately, as a discrete legal element of the crime of persecution, not as part of the finding of the incitement discussion. In this case, however, the Appeals Chamber's finding of what constituted the *actus reus* of incitement for persecution was also riddled with references to the violence which followed Šešelj's speech. The centrality given to the impact of the speech (i.e., the ensuing threats and violence) cannot be underestimated. This may explain why Presiding Judge Meron, who had partially dissented on hate speech as persecution in the *Nahimana et al.* Appeal Judgment, agreed to this finding.⁸³

Thus, although some commentators argue that a link between the speeches and the subsequent acts that constitute persecution as a crime against humanity is not required, and that it is not necessary for a particular result to be proven as a direct consequence of the speech, the *Šešelj* Appeal Judgment, read as a whole, offers scant support for this viewpoint.⁸⁴ For a finding of

78 *Šešelj* Appeal Judgment, § 164 and note 580 (referring to *ibid.*, §§149–150). See also *ibid.*, § 154.

79 *Ibid.*, § 164.

80 *Ibid.*, § 163. This is a term borrowed from the *Streicher* Finding and *Ruggiu* Trial Judgment. See *Streicher* Finding, 302; Judgment and Sentence, *Ruggiu* (ICTR-97-32-I), Trial Chamber 1, 1 June 2000 (*Ruggiu* Trial Judgment), § 19.

81 *Šešelj* Appeal Judgment, § 154.

82 See *supra* text before note 57.

83 Cf. *Nahimana et al.* Appeal Judgment, § 988; *Nahimana et al.* Appeal Judgment, Partly Dissenting Opinion of Judge Meron, §§ 3–4, 12–13.

84 See Timmermann, *supra* note 7, at 144 and note 93 (commenting on *Nahimana et al.* Trial Judgment, § 1073 and the *Šešelj* Trial Judgment); See also Wilson and Gillett, *supra* note 6, at 144.

persecution, the *Šešelj* Appeal Judgment — which is the most recent in the developing line of jurisprudence of ICTR, ICTY and IRMCT — does actually require incitement to violence being inciting crimes and violent acts that occur as a consequence of such incitement.

D. Actus reus of Persecution: In Violation of a Fundamental Right

As briefly mentioned above, the *Šešelj* Appeal Judgment goes on to hold that *Šešelj*'s speech denigrated the Croats on the basis of their ethnicity, in violation of their 'right to respect for dignity as human beings'.⁸⁵ It further endorsed the ICTR Appeals Judgment in the *Nahimana et al.* case that 'speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security of the members of the targeted group and therefore constitutes "actual discrimination"'.⁸⁶

The use of the term 'respect for dignity' can be traced back to the *Nahimana et al.* Appeal Judgment.⁸⁷ Some have argued that it is unclear how *Šešelj*'s words were degrading or dehumanizing⁸⁸ and that 'respect for dignity as human beings' is not a right in and of itself.⁸⁹ However, reading this part of the *Šešelj* Appeal Judgment in context, it is the right to security of the Croats and other non-Serbs that is effectively violated by the persecution.⁹⁰ It would indeed have been preferable had the Appeals Chamber not used this terminology, 'their right to respect for dignity as human beings', but instead referred to their right of equality and freedom from discrimination — a cornerstone of the human rights system⁹¹ — which is what it was in fact arguably referring to, in context. In any event, it seems relevant that the Appeals Chamber only finds that *Šešelj*'s words reach the requisite level of gravity amounting to the *actus reus* of persecution as a crime against humanity only after considering both aspects (violation of the right to security and violation of the right to human dignity/freedom from discrimination).

85 *Šešelj* Appeal Judgment, § 163.

86 *Ibid.*, § 159

87 See *Nahimana et al.* Appeal Judgment, §§ 986–987.

88 See Timmermann, *supra* note 6, at 116–118.

89 Wilson and Gillett, *supra* note 6, § 140 and note 157. The opposite view is also prevalent. Some states consider that the right to dignity should be respected and protected in and of itself. See e.g. Constitution of South Africa, Art. 10 available online at <https://www.gov.za/documents/constitution/chapter-2-bill-rights#10> (visited 17 March 2020); Basic Law of Germany, Art. 1(1) available online at <https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510> (visited 17 March 2020). See also generally D. Kretzmer and E. Klein, *The Concept of Human Dignity in Human Rights Discourse* (Brill, 2002).

90 See also *Šešelj* Appeal Judgment, §§ 165–166.

91 See e.g. General Comment No. 34, Article 19: Freedoms of opinion and expression (CCPR Comment No. 34), UN Doc. CCPR/C/GC/34, 12 September 2011, § 2; HRC 16/18 Resolution, § 1.

E. *Mens rea of Persecution*

The *mens rea* of persecution is the 'specific intent to cause injury to a human being because he belongs to a particular community or group'.⁹² This specific intent must be proven over and above the general intent to commit the crime of persecution.⁹³ The Appeals Chamber has held that, while the requisite discriminatory intent may not be inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity, the 'discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent'.⁹⁴

In the case of Hrtkovci, based on the same facts from which it concluded that there was incitement amounting to persecution, and in line with its jurisprudence, the Appeals Chamber also inferred Šešelj's discriminatory intent.⁹⁵ It was thus able to exclude inferences that the speech was given as propaganda, in support of the war effort, or to strengthen the morale of the Serb troops (as Šešelj had invariably argued throughout the proceedings).⁹⁶ A more detailed explanation of why it excluded these other inferences (which, in the minds of the appellate judges, would have had to be unreasonable given the circumstances) would have helped shed some light on how triers of fact ought to weigh evidence and would have provided insight into the legal standard applicable with regard to the *mens rea* of persecution carried out through hate speech.

6. Instigating Crimes through Hate Speech

The Šešelj Appeals Chamber also addressed how hate speech may constitute instigation, not as a crime but rather a mode of liability. In the case of instigation, the accused may be convicted if the instigation to a crime under the jurisdiction of the court or tribunal was a *factor substantially contributing to the conduct* of another person committing a crime.⁹⁷ After an overview of the relevant speeches, this section will discuss them in the light of the elements of instigation as a mode of liability, that is, prompting another to commit a crime, and the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation.⁹⁸

92 Judgment, *Kordić and Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004 (*Kordić & Čerkez* Appeal Judgment), § 111.

93 *Ibid.*, § 111.

94 Judgment, *Šainović, Pavković, Lazarević, Lukić* (IT-05-87-A), Appeals Chamber, 23 January 2014, § 579.

95 Šešelj Appeal Judgment, § 164.

96 See *supra* text before notes 41 and 42.

97 *Kordić & Čerkez* Appeal Judgment § 27. See Šešelj Trial Judgment, §§ 294-296; Šešelj Appeal Judgment, § 124.

98 See *infra* discussions at 6.B. *Actus reus of Instigation: Direct Causal Connection* – 6.E. *Mens rea of Instigation*

A. Overview of Relevant Speeches

With regard to the speech in Hrtkovci, the Appeals Chamber found that Šešelj had instigated deportation, persecution (forcible displacement) and other inhumane acts (forcible transfer) as crimes against humanity against non-Serbs.⁹⁹ In this context, the Appeals Chamber noted that Šešelj had influence over the members of his political party, that he was even seen by some ‘as if he were a god’, and that his speeches had a significant impact on the audience.¹⁰⁰ The Appeals Chamber further noted that, after Šešelj’s speech, many Croats left for Croatia either out of fear, or by fraudulent housing exchanges with Serb refugees amid an atmosphere of coercion, harassment, and intimidation which was met by inaction on the part of law-enforcement and other officials.¹⁰¹ In fact, the Appeals Chamber explained, Serbs, including the then Hrtkovci mayor himself, who had listened to Šešelj’s speech, regularly threatened non-Serbs who remained in the town.¹⁰² The Appeals Chamber thus considered that in the light of Šešelj’s influence over the crowd, the striking parallels between his words and the acts subsequently perpetrated by others including, *inter alia*, members of his audience, no reasonable trier of fact could have found that he had not substantially contributed to the conduct of the perpetrators.¹⁰³

Other speeches considered in the context of instigation were the ones given by Šešelj in the Serb Parliament. In the speech of 1 April 1992, Šešelj had stated: ‘[w]e are going to expel the Croats . . . We are simply going to pack you into trucks and trains and let you manage in Zagreb.’¹⁰⁴ In his second relevant speech, on 7 April 1992, he stated: ‘[P]erhaps the best solution . . . would be simply putting [Croats] . . . on buses and trucks and taking them to Zagreb.’¹⁰⁵

The Trial Chamber found that the Serb Parliament speeches clearly constituted calls for the expulsion and forcible transfer of Croats; by another majority, the Trial Chamber however reached the conclusion that they were an ‘expression of an alternative political programme that was never implemented’.¹⁰⁶ It also held that, given the lack of measurable impact and the harsh criticism Šešelj had received for his speeches, it could not find that they amounted to incitement to war crimes.¹⁰⁷ Furthermore, the Trial Chamber found that the prosecution had not shown a causal link between Šešelj’s speeches to the Serb Parliament on 1 and 7 April 1992 and the crimes committed in April 1992 in Mostar, Zvornik, and Greater Sarajevo, or that the crimes committed between May 1992 and September 1993 could be

⁹⁹ Šešelj Appeal Judgment, § 150, 154–155.

¹⁰⁰ *Ibid.*, § 147, referring to Šešelj Trial Judgment, § 341. See also Dissenting Opinion, § 12.

¹⁰¹ Šešelj Appeal Judgment, §§ 150, 154.

¹⁰² *Ibid.*, § 154.

¹⁰³ *Ibid.*

¹⁰⁴ Šešelj Trial Judgment, § 336.

¹⁰⁵ *Ibid.*, § 337.

¹⁰⁶ *Ibid.*, §§ 335, 338.

¹⁰⁷ *Ibid.*, §§ 338–339.

attributed to him.¹⁰⁸ The Trial Chamber therefore found Šešelj not guilty of instigating such crimes.¹⁰⁹

The Appeals Chamber left this finding unchanged because, in its view, the prosecution had not demonstrated at trial the extent of the dissemination of Šešelj's speeches and the specific impact they had had on the commission of crimes in Mostar, Zvornik, and Greater Sarajevo.¹¹⁰ The Appeals Chamber also found that the temporal link between the speeches and the subsequent crimes was tenuous.¹¹¹

In March 1992, Šešelj had further given a speech in Mali Zvornik in which he had called on his Serb 'brother Chetniks, especially you across the Drina' ... to clear up Bosnia from the pagans and show them the road to the east where they belong'.¹¹² Šešelj himself confirmed that he had 'attacked fundamentalist Muslims and pan-Islamists who wanted Bosnia to separate from Yugoslavia, and called them "pogani"', (which according to him meant 'waste' or 'faeces') and 'balijas' (a derogatory term for Muslims).¹¹³ The Trial Chamber, by majority, did not find that, by calling on the Serbs to 'clear up' Bosnia of the 'pogani' and the 'balijas', Šešelj was calling for the ethnic cleansing of the non-Serbs of Bosnia.¹¹⁴ The Trial Chamber found that, given the context, this could have been a call by Šešelj to galvanize the Serbs in support of the war effort.¹¹⁵ Again, the Trial Chamber noted that there was no proof of the impact of this speech.¹¹⁶

With regard to this speech, the Appeals Chamber instead considered that (based on the political context of a possible declaration of independence by Bosnia and on evidence before the Trial Chamber) no reasonable trial chamber could have found that Šešelj's speech did not call for ethnic cleansing.¹¹⁷ It held that the inflammatory language of Šešelj's speech could have prompted other persons to commit crimes against non-Serb civilians.¹¹⁸ The Appeals Chamber further assessed whether the Trial Chamber's finding that the speech (as well as other statements made by Šešelj) 'had an impact on', or 'causal link' to the commission of crimes against non-Serbs.¹¹⁹ It then however went on to find

108 *Ibid.*, § 343.

109 *Ibid.*, § 350.

110 *Šešelj Appeal Judgment*, § 132. The Appeals Chamber however found that Šešelj had the *mens rea* for persecution including discriminatory intent. *Ibid.*, §§ 150, 155 The Appeals Chamber reversed the Trial Chamber's finding that there was no widespread or systematic attack against the civilian population in Croatia and Bosnia and Herzegovina. *Ibid.*, §§ 71, 76–78. Moreover, given the content of Šešelj's speech and the contemporaneous events in Croatia and Bosnia and Herzegovina, the Appeals Chamber found that the perpetrators were also aware that their acts formed part of the attack. *Ibid.*, § 150.

111 *Ibid.* See *infra* discussion on 6.C. *Causal Connection: Temporal*.

112 *Šešelj Trial Judgment*, §§ 324, 327. See also *ibid.*, §§ 321–322, 325–327.

113 *Ibid.*, § 325.

114 *Ibid.*, § 328. The Trial Chamber failed to consider the pejorative connotation of these words in the Bosnian Serb language.

115 *Ibid.*, § 328.

116 *Ibid.* See *infra* discussion at 6.C. *Causal Connection: Temporal*.

117 *Šešelj Appeal Judgment*, § 130.

118 *Ibid.*

119 *Ibid.*, § 131.

that, because the prosecution's argument on appeal was the temporal link between Šešelj's speeches and the contemporaneous or subsequent commission of crimes in various locations, given the time span of 'nearly 3 weeks' from the time of his speech, a reasonable trier of fact could have found such a link tenuous.¹²⁰ It therefore upheld the Trial Chamber's overall finding.¹²¹

On 7 November 1991, on his way to Vukovar (Croatia), Šešelj had held a press conference in the town Šid in Serbia, close to the border with Croatia (at the time Croatia had declared its independence but had not been recognized as a separate state), stating that 'this entire area will soon be cleared of the Ustashas'.¹²² Then, on 12 and 13 November 1991, he made several additional speeches in Vukovar, saying to Serb forces and to the Šešeljevci that 'no Ustashas must leave Vukovar alive' and that they should 'show [them] no mercy'.¹²³ Going around the town in a vehicle with a loudspeaker, Šešelj also allegedly called on Croat soldiers to surrender, and according to some of the evidence, he told the 'Ustashas' that if they did not, they would die.¹²⁴

The Trial Chamber found that, with respect to Šešelj's speeches in November 1991, the content of what he actually said was equivocal — noting that there was a reasonable possibility that the speeches were rather made to support the morale of the Serb troops.¹²⁵

On appeal, the prosecution argued that, as the war in Croatia escalated and after months of 'building a reservoir of hate', Šešelj 'triggered' the crimes committed in Vukovar.¹²⁶ It referred to evidence that these statements were understood by the Šešeljevci to mean that Croat detainees should be executed, as well as to evidence allegedly showing that Šešelj deliberately equated the broader Croat population with 'Ustashas'.¹²⁷ The Appeals Chamber held that the prosecution had not addressed the Trial Chamber's main reservation — the content of Šešelj's statements and thus left this finding undisturbed.¹²⁸

B. Actus reus of Instigation: Direct Causal Connection

Turning to the Appeals Chamber's assessment of instigation, the discussion on the Hrtkovci speech is the most instructive. Addressing the prosecution's

120 *Ibid.*, § 132.

121 *Ibid.* See *infra* discussion at 6.C. *Causal Connection: Temporal*.

122 Šešelj Trial Judgment, § 306. The word 'Ustashas', from the name of a nationalist Croat organization active in the 1930s and 1940s, is linked to fascist ideology and practices, including persecution of Serbs, Jews, Romani and other minorities, as well as to brutal violence.

123 *Ibid.*, §§ 309–310.

124 *Ibid.*, §§ 310, 318.

125 *Ibid.*, §§ 304–318. See *infra* discussion at 6.D. *Actus reus of Instigation: Content and Purpose of the Speech*.

126 Šešelj Appeal Judgment, § 136.

127 Šešelj Appeal Judgment, § 136. See *infra* discussion at 6.D. *Actus reus of Instigation: Content and Purpose of the Speech*.

128 *Ibid.* § 137. See *infra* discussion at 6.D. *Actus reus of Instigation: Content and Purpose of the Speech*.

argument that Šešelj's speech was given to a large audience and was quickly disseminated, the Appeals Chamber noted that the Hrtkovci speech was given to 'some 700 Serb Radical Party sympathizers and citizens[,] 60% of whom were Serbian refugees from Croatia'.¹²⁹ While at first glance the size of the audience and the quick dissemination of Šešelj's speech may appear to be irrelevant — they often go to prove the public element of the crime of direct and public incitement to commit genocide —¹³⁰ they also show the causal connection required between the instigation and the crimes committed. Hence, the Appeals Chamber focused carefully on the presence of some perpetrators of crimes, including the future mayor of the town himself, in Šešelj's audience.¹³¹ The thread running through this assessment is the direct impact the speech had on some members of his audience who subsequently went on to commit crimes, such as forcible transfer.¹³² This appears to be so despite the fact that the Appeals Chamber did not explicitly use the term 'direct'. In this regard, it appears reasonable to conclude that directness is not required to prove a substantial contribution to the conduct of the person committing the instigated crime, although it would probably be easier to meet the burden of proof if there is proof instigation was indeed direct. One wonders if this is again the lingering influence of the jurisprudence on direct and public incitement to genocide.¹³³

Regarding the speeches in the Serb Parliament, the Appeals Chamber recalled that the prosecution had not demonstrated at trial the breadth of their

129 Šešelj Appeal Judgment, § 147.

130 See *supra* text before notes 19–20.

131 *Ibid.*, §§ 147, 149, 154.

132 Some ICTR and ICTY trial chambers have indeed held that for instigation, the causal connection must have 'directly and substantially contributed' to the subsequent commission of crimes or must have been a 'clear contributing factor'. Judgment and Sentence, *Ndindabahizi* (ICTR-2001-71-I), Trial Chamber 1, 15 July 2004, § 456; Judgment, *Kvočka, Kos, Radić, Žigić, Prcać* (IT-98-30/1-T), Trial Chamber, 2 November 2001, § 252. Cf. Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, *Ntaganda* (ICC-01/04-02/06-309 09-06-2014 1/98 EC PT), Pre-Trial Chamber II, 9 June 2014, § 153 (holding that for inducement, there has to be, *inter alia*, 'a direct effect on the commission or attempted commission of the crime'); Judgment pursuant to Art. 74 of the Statute, *Bemba Gombo, Kilolo Musamba, Mangenda Kabongo Babala Wandu, Arido* (ICC-01/05-01/13-1989-Red 19-10-2016 1/458 NM T), Trial Chamber VII, 19 October 2016, § 73 (holding that the modes of liability of 'soliciting and inducing' in Art. 25(3)(b) of the ICCSt. 'fall into the broader category of "instigating"').

133 See e.g. *Nahimana et al.* Appeal Judgment, §§ 677, 701, 711; *Ngirabatware* Appeal Judgment, § 58; *Nyiramasuhuko et al.* Appeal Judgment, § 3338. It is interesting to note Judge Lattanzi's Dissenting Opinion on instigation. She referred to the content of the speech, means of dissemination and impact, seemingly implying that these are legal requirements for instigation on the basis of speech. See Dissenting Opinion, §§ 95–123. Rather, impact is likely relevant only to the extent that it shows the substantial contribution of the instigator on the perpetrators of crimes. On the other hand, the means of dissemination of the speech are not directly related to a legal requirement for instigation: while it is relevant on an evidentiary level, the emphasis on dissemination of the speech (and its modalities) once again seems to lead back to the elements for the crime of direct and public incitement to commit genocide, not incitement as a mode of liability, and thus may lead to judicial confusion. In fact, it is the *purpose* of the speech and the *context*, discussed in Judge Lattanzi's dissent together with the *impact* of the speech, which are more pertinent. See Dissenting Opinion, §§ 117–119.

dissemination and the ‘specific impact’ that they had had on the commission of crimes.¹³⁴ These are both puzzling statements. With regard to the former, this is hardly a fair comment on the part of the Appeals Chamber because, by its nature, parliament is a public place, and its impact is, by definition, public. In fact, parliament is so obviously a public place that the prosecution would have met the ‘publicity’ threshold, if this were legally required. But instigation does not require publicity, according to previous statements of the law by ICTY and ICTR. Indeed, wide dissemination of a speech is also not necessary to prove instigation. Why the Appeals Chamber mentioned this as though it were a legal requirement remains a mystery.

As to the ‘specific impact’ comment, it is unclear what this means as well. There is no legal explicit requirement amounting to ‘specific impact’ for a finding of instigation: there need only be a substantial contribution through this speech of the crimes that ensued. Is this reference to specific impact possibly related to a temporal link?¹³⁵ In the context of instigation, the ‘causal connection’¹³⁶ between the instigation and the *actus reus* of the crime is necessary to show the instigation was substantial; maybe the Appeals Chamber was trying to detail what is needed, especially in the context of ‘political’ speeches, for the link (i.e. the contribution) between the words of the instigator and the crimes committed by others, to be substantial enough. The Appeals Chamber’s use of the term ‘specific’, possibly meaning direct, unfortunately causes more confusion in an area where jurisprudence is scant.

C. Causal Connection: Temporal

As to the Mali Zvornik and the Serb Parliament speeches, the Appeals Chamber found that the time elapsed between them and the subsequent crimes could lead a reasonable trier of fact to conclusions other than a finding of causality, although this argument is definitively under-developed.¹³⁷ For instance, the time span of ‘nearly 3 weeks’ from the time of Šešelj’s Mali Zvornik speech and the subsequent crimes committed in Zvornik was considered a ‘tenuous’ link.¹³⁸ With regard to the speeches in the Serb Parliament, the Appeals Chamber merely held that, on appeal, the Prosecution had failed to show that no reasonable trier of fact could have reached the impugned conclusion.¹³⁹

134 See *supra* text before note 110.

135 See *infra* discussion at 6.C. *Causal Connection: Temporal*.

136 See *supra* discussion at 6.B. *Actus reus of Instigation: Causal Connection*.

137 Šešelj Appeal Judgment, § 132.

138 *Ibid.* Meanwhile, in its discussion on the Hrtkovci speech, the Appeals Chamber noted that the Croats left Hrtkovci in the four months after his speech. However, the temporal link was not the main argument of the prosecution in that case, so the Appeals Chamber did not comment on it. It also appears not to have been determinative of its finding of persecution. See *ibid.*, § 163.

139 *Ibid.*, § 132. See also *supra* text before note 111.

In this regard, it is noteworthy that the *Nahimana et al.* Appeal Judgment upheld a finding of instigation following an RTLM broadcast which urged Tutsis to return to their homes, when many of those who returned were immediately killed — on the same day of their return and the broadcast.¹⁴⁰ The *Nahimana et al.* Appeals Chamber also left undisturbed a finding of instigation in the killing of three priests who had been named in a RTLM broadcast of 20 May 1994 and were subsequently killed. One of them, Father Ngoga, who had earlier managed to escape, was killed 11 days after the broadcast.¹⁴¹ Thus, even when a broadcast did not include a call for the killing of Tutsis, a direct temporal link was still found between the broadcast and the commission of the subsequent crimes. In this case, scholars have argued that the context of the RTLM other broadcasts (and the overall situation in the area) was also relevant to the finding of instigation.¹⁴²

Looking at other earlier cases, such as *Streicher* and *Ruggiu*, the time elapsed between the speech or broadcast, on the one hand, and the commission of crimes for which they were held responsible, on the other, varied between weeks and months (in the case of Nazi Germany, arguably even years).¹⁴³ Granted, those cases referred to persecution as a crime against humanity (and direct and public incitement to genocide) and the temporal link was considered in the context of discrimination in fact, an aspect of the *actus reus* of persecution: these findings were not taking into account the temporal link as relevant to the causal connection with regard to instigation. However, when assessing the impact of speech, courts tend to look at a series of events that culminate in the commission of crime(s), regardless of the rubric under which the charges are being considered.¹⁴⁴ Causation is a tool to gauge the mental effect a speech had on the perpetrators of the crime(s) in question.¹⁴⁵ As such, the test is the same whether the tool is used in the context of examining the crime of persecution or the mode of liability of instigation.

In light of this, it appears somewhat arbitrary for the *Šešelj* Appeals Chamber to implicitly make a finding that, in the context of instigating a crime, a temporal link of approximately three weeks is tenuous. The Appeals Chamber appears to be considering that a three-week gap between the speech and the subsequent (instigated) crimes does not translate into a substantial contribution as other factors may have also contributed to the crimes in question, thus negating the substantial nature of the contribution of the original speech. Indeed, the longer the time elapsed between the speech and the crimes that took place, the greater the possibility that other events could have intervened and (at least partially) contributed to the actual commission of such crimes.¹⁴⁶ Moreover, being an appellate review, the Appeals Chamber was only

140 *Nahimana et al.* Appeal Judgment, § 515; *Nahimana et al.* Trial Judgment, §§ 449, 482.

141 *Ibid.*, § 515; *Nahimana et al.* Trial Judgment, §§ 411, 482.

142 Timmermann, *supra* note 7, at 149.

143 *Streicher* Finding, 301–304; *Ruggiu* Trial Judgment, §§ 24, 43, at 18–19.

144 See Wilson, *supra* note 25, at 166–168.

145 *Ibid.*

146 See *Nahimana et al.* Appeal Judgment, § 513.

looking at whether a reasonable trier of fact could have reached such findings, even if maybe some of the appellate judges themselves would have reached a different conclusion on the same facts. Nonetheless, even if other factors had intervened to partially contribute to the crimes committed, a trier of fact should be careful to keep in mind that it is possible to have multiple factors causing a crime (each contributing), and still find instigation¹⁴⁷: what is required is that the speech was the cause that made a substantial contribution to the crime, not the sole or essential contribution.

What if the prosecution had been able to prove a link other than the temporal link to show that Šešelj's speech amounted to a substantial contribution and therefore instigation? For instance, if it could have shown that some Serb followers of Šešelj, or the Šešeljevci, over whom he had at least *de facto* moral authority, committed some of these subsequent crimes? What if some Šešeljevci were proven to have been present in the audience when he gave this speech, as was the case with the Hrtkovci speech? What if evidence could have been found, from insiders in the Serb groups, of how the speech had prompted them to commit crimes? In such instances, a trier of fact, applying the law correctly, would have had to establish instigation, and reach a verdict very different from the one entered by the Trial Chamber and upheld by the Appeals Chamber.

Understandably, on the evidence discussed by the Trial Chamber, the Appeals Chamber instead seemed reluctant to assess evidence on the causal connection itself, since the relationship in those instances of speeches was somewhat more indirect than what it had in the case of the Hrtkovci speech. Yet, we would have benefited from a more thorough analysis by the Appeals Chamber on this point.¹⁴⁸

D. Actus reus of Instigation: Content and Purpose of the Speech

It is interesting to note that with regard to the Vukovar speeches, the Appeals Chamber framed the main issue as being that of the *content* of the message. What a speaker actually says is the starting point of any inquiry as to whether a speech can be considered as criminal. The term '*Ustasha*' according to Šešelj himself, referred to fascist Croats who had sided with the Nazis in World War II, and who had killed Serbs.¹⁴⁹ In the 1990s, according to him, this term meant the Croatian extremists, supported by Franjo Tuđman, then President of

147 See *Kordić & Čerkez* Appeal Judgment, § 27.

148 This case also highlights the dilemma prosecutors face with causation and why some scholars argue that *at least in the context of public and direct incitement to genocide*, 'reasonable probability' or 'likelihood' should replace 'causation' as a test (see S. Benesch, 'The Ghost of Causation in International Speech Crime Cases', in P. Dojčinović (ed.), *Propaganda, War Crimes Trials and International Law* (Routledge, 2012) 254–267, at 256, 262–264; H. van der Wilt, 'Between Hate Speech and Mass Murder: How to Recognize Incitement to Genocide', in H.G. van der Wilt, J. Vervliet et al. (eds), *The Genocide Convention: The Legacy of 60 Years* (Brill, 2012), at 41–50. However, in relation to instigation, causation remains a legal requirement so this suggestion is less relevant in this specific context.

149 *Šešelj* Trial Judgment, § 317. See also *ibid.*, § 14.

Croatia, who persecuted Serbs.¹⁵⁰ The Trial Chamber did not explain the historical and cultural meaning of this word further, nor why it chose to believe Šešelj's own explanation of who he was referring to when he used this word. The Trial Chamber also did not explain why it did not give weight to the testimony of those who explained what the words meant to them. Such an approach was clearly inconsistent with that taken in the *Nahimana et al.* and *Bikindi* Trial Judgments, which relied on testimony to decipher the meaning of historical references made by the speakers, and how these references had changed over time.¹⁵¹ Such analysis is unfortunately lacking in the Šešelj Trial Judgment.

A closer look at what the Šešelj Trial Chamber actually held shows that the emphasis in its analysis was on another issue — the *purpose* of the speech. Besides the unclear content of the speech, the Trial Chamber found that:

*more decisively, [it]... does not deem that the reported speeches, even if we assume they have been proven, can be considered as acts of instigating a crime. Their context rather suggests that these were speeches aimed at reinforcing the Accused's political party.*¹⁵²

Assuming the speech was actually given (something the Trial Chamber should have probably established beyond the reference to it being 'reported'), a reasonable trier of fact should have assigned more weight to it, especially in the atmosphere of witness intimidation surrounding this trial, together with the out-of-court statements of recanted witnesses.¹⁵³ In light of these circumstances and if Šešelj had actually uttered the words alleged (including that 'no *Ustashas* must leave Vukovar alive', that Serbs should 'show [them] no mercy', and the other speeches against Croats), it would have been reasonable for a trier of fact to reach the conclusion that these speeches *had* prompted crimes: at the end of the day, whether a speech has a substantial effect on the

150 *Ibid.*, § 317 & note 371.

151 See e.g. *Nahimana et al.* Trial Judgment, §§ 394, 456-458, 473, 481, 652-656, 666; *Bikindi* Trial Judgment, §§ 247-252. See also *Ruggiu* Trial Judgment, §§ 44(iii)-(iv).

152 Šešelj Trial Judgment, § 307 (emphasis added).

153 See Dissenting Opinion, § 22. In an extraordinary line of procedural obstructions and contempt proceedings related to the main criminal case against him, Šešelj was inter alia convicted for revealing the identities of protected witnesses on several occasions, while persons closely collaborating with him were convicted for witness intimidation. See e.g. Judgment, Šešelj (IT-03-67-R77.2), Trial Chamber, 24 July 2009 (public redacted version); Judgment, Šešelj (IT-03-67-R77.2-A), Appeals Chamber, 19 May 2010; Judgment, Šešelj (IT-03-67-R77.3), Trial Chamber, 31 October 2011 (public redacted version); Judgment, Šešelj (IT-03-67-R77.3-A), Appeals Chamber, 28 November 2012; Judgment, Šešelj (IT-03-67-R77.4), Trial Chamber II, 28 June 2012 (public redacted version); Judgment, Šešelj (IT-03-67-R77.4-A), Appeals Chamber, 30 May 2013 (public redacted version). See also Judgment, *Petković* (IT-03-67-R77.1), Trial Chamber III, 11 September 2008 (public redacted version); Order Lifting Confidentiality of Order in Lieu of Indictment and Arrest Warrants, *Jojić et al.* (IT-03-67-R77.5), Trial Chamber I, 1 December 2015; Order of Transfer to the International Residual Mechanism for Criminal Tribunals, *Jojić et al.* (IT-03-67-R77.5), President's Office, 29 November 2017.

commission of a crime is a fact-based inquiry.¹⁵⁴ In any event, and even considering the role of appellate instances, a more in-depth analysis on the part of the Appeals Chamber on the content and purpose of the speech given would still have been useful for further clarity of the law.

E. *Mens rea of Instigation*

The ICTY Appeals Chamber had previously held that a person who instigates an act or omission with the *awareness of the substantial likelihood* that a crime will be committed in the execution of that instigation, has the requisite *mens rea* for establishing criminal liability.¹⁵⁵ This means that an individual who instigates an act with the awareness of the substantial likelihood that persecution as a crime against humanity will be committed in the execution of such instigation may be held liable for the crime of persecution.¹⁵⁶

The *Šešelj* Appeal Judgment held that instigation implies ‘prompting another person to commit an offence’, confirming the above-mentioned standard. Although proof of a causal connection between the instigation and the *actus reus* of the crime is required, the prosecution need not prove that the crime would not have been perpetrated without the accused’s prompting: in other words, the contribution does not need to be essential.

Applying this standard, the *Šešelj* Appeals Chamber found that *Šešelj* intended to prompt the commission of crimes or, at the very least, was aware of the substantial likelihood that they would be committed as a result of his instigation through his speech of 6 May 1992 in Hrtkovci.¹⁵⁷ Again, the *mens rea* discussion is factual: the Appeals Chamber explicitly referred to the ‘content’ of his speech and inferred his *mens rea* from the ‘inflammatory words’ used.¹⁵⁸ This does highlight the importance of the actual words used, which should in fact be the starting-point of any analysis of hate speech cases.

7. Conclusion

The *Šešelj* Appeal Judgment was an opportunity to clarify the earlier case-law on what kind of hate speech can be regarded as criminal. The IRMCT Appeals Chamber however failed to explicitly and unequivocally address the issue. Based on a plain reading of the judgment, it is only the more extreme form of incitement to violence, that is inciting to commit crimes *and* ensuing violent acts that constitutes persecution as a crime against humanity, not ‘mere’

154 Cf. Judgment, *Popović, Beara, Nikolić, Miletić, Pandurević* (IT-05-88-A), Appeals Chamber, 30 January 2015, § 1741 (on aiding and abetting); Judgment, *Nzabonimana* (ICTR-98-44D-A), Appeals Chamber, 29 September 2014, § 489 (on aiding and abetting).

155 *Kordić & Čerkez* Appeal Judgment, § 112; Judgment, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004, § 166.

156 *Ibid.*

157 *Šešelj* Appeal Judgment, § 154.

158 *Ibid.*

incitement to discrimination or hatred. This requirement for incitement to violence to be incitement to commit crimes with violent acts as a result of such incitement is not only supported by a holistic reading of the more recent ad hoc tribunals' appeals chambers' jurisprudence, but is also reflective of the current state of international human rights law, with its emerging consensus that allows criminalization of hate speech, but only when it amounts to incitement to imminent violence.¹⁵⁹ International human rights law, as it stands today, does not extend to the criminalization of other forms of incitement.¹⁶⁰

With regard to the second question this article posed, i.e. whether a causal nexus is required between incitement to violence — incitement to commit crimes, and any subsequent acts of violence, the answer is in the affirmative. Not only is actual discrimination an element of the crime of persecution: in *Šešelj*, the actual violent acts that ensued were actually decisive to the finding of persecution committed through incitement to violence. Because the appellate judges did not discuss the lapse of time between the Hrtkovci speech and the subsequent violent acts, it is hard to ascertain if imminence is also required, and what this might entail in various factual circumstances.¹⁶¹

Turning to hate speech as a form of instigation of crimes (a mode of liability, rather than a crime itself), the *Šešelj* Appeals Chamber's restatement of the law was less controversial. The substantial causal connection required for instigation of a crime must be direct, whether temporal or otherwise — although the Appeals Chamber did not explicitly use the term 'direct', and directness is not a legal requirement for instigation.

In any event, in the *Šešelj* case, the difference between, on the one hand, hate speech as the *actus reus* of persecution, which requires incitement to violence, that is, incitement to commit crimes and subsequent acts of violence and, on the other, instigation, which requires a substantial contribution to the ensuing crime, remained somewhat blurred. This is in part owing to the reliance by the Appeals Chamber on the same underlying factual findings, which formed the basis for the prosecution's arguments on both persecution and instigation. But it is also because the Appeals Chamber did not clearly define whether criminal hate speech amounts to the commission of crimes. Defining hate speech in international criminal law thus continues to be elusive.

159 See *supra* text before note 77.

160 See *supra* text before note 76.

161 It is of note that imminence has been identified as an aspect of incitement by the Appeals Chamber in the context of direct and public incitement to genocide. See *supra* text before note 24.